No.- 77-1118

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL TRADE COMMISSION, PETITIONER

v.

WARNER-LAMBERT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit that modified the Commission's order, but only if the Court grants the petition for a writ of certiorari in No. 77–855.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51a–86a)[1] and the supplemental opinion on the peti-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 77–855. Because the appendices to No. 77–855 contain all of the materials required to be reproduced (see Rule 23(1)(b) of the Rules of this Court), we do not include them as appendices to this cross-petition.

tions for rehearing (Pet. App. 87a–94a) are reported at 562 F. 2d 749. The decision and order of the Federal Trade Commission (Pet. App. 1a–47a) are reported at 86 F.T.C. 1398.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1977. Timely petitions for rehearing were denied on September 14, 1977 (Pet. App. 95a–97a). By order of December 8, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission may require an advertiser to state, as part of a disclosure necessary to make the advertisement and sale of its product nondeceptive, that the disclosure is "[c]ontrary to prior advertising."

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. (1970 ed.) 45, provided in pertinent part: [2]

[2] After the complaint issued in this case, subsections (a) and (b) of Section 5 were amended by adding the words "or affecting" before "commerce" and by renumbering paragraph (a)(6) as paragraph (a)(2). 88 Stat. 2193, 89 Stat. 801, 15 U.S.C. (Supp. V) 45(a)(1), (2).

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act], it * * * shall issue * * * an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

This petition, like Warner-Lambert's petition in No. 77–855, arises out of efforts by the Federal Trade Commission to correct the consequences of advertisements misrepresenting that Listerine Antiseptic Mouthwash ("Listerine") is beneficial for the treatment of colds and sore throats. Most of the essential facts are set out at pages 2–8 of our brief in opposition to Warner-Lambert's petition.

The Commission required Warner-Lambert to include, in approximately $10 million worth of future advertising, the statement: "Contrary to prior advertising, Listerine will not help prevent colds or sore

throats or lessen their severity" (Pet. App. 46a). The court of appeals concluded that the Commission properly ordered Warner-Lambert to disclose that Listerine is ineffective as a treatment for colds and sore throats (Pet. App. 54a–60a, 72a–74a). The court modified the Commission's order, however, by deleting the introduction "[c]ontrary to prior advertising."

The court reasoned that the introduction could serve only two purposes: "either to attract attention that a correction follows or to humiliate the advertiser" (Pet. App. 75a). The Commission disclaimed any reliance on the latter purpose, and the court held that the former purpose would be achieved by the fact that the disclosures about colds and sore throats must be made conspicuously (Pet. App. 75a). Therefore, the court concluded, the need for the preamble "is obviated by the other terms of the order" (*ibid.*; footnote omitted) and it is "not warranted" (*id.* at 76a).

DISCUSSION

Warner-Lambert's petition (No. 77–855) seeks review of the court of appeals' holdings (i) that the Commission has the statutory authority to order advertisers to disclose facts necessary to correct misimpressions created by prior advertisements and (ii) that the Commission properly exercised its authority to require Warner-Lambert to disclose that Listerine is not effective for the treatment of colds and sore throats. We have opposed Warner-Lambert's petition.

Although the court of appeals modified the Commission's order, the Commission is prepared to accept that modification in this case, provided that the remaining portions of its order are enforced. Because Warner-Lambert has sought review of the portion of the judgment that enforced the Commission's order, however, we have filed this petition so that the Court may consider the entire case if it should conclude, contrary to our argument in No. 77–855, that review is appropriate.

The Commission believes that the court of appeals' modification of its order was improper. "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices * * * and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611, 613.[3] The court of appeals did not find that the preamble to the corrective language bears "no reasonable relation[ship]" to Warner-Lambert's unlawful practices, and it could not have so found. The preamble is truthful (the information that Listerine is ineffective for the treatment of colds and sore throats is contrary to statements in prior advertising), and the

[3] See also *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394–395; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

preamble would serve the salutory purpose of attracting attention to the required disclosure.[4]

Moreover, the preamble does not simply attract attention. It also provides the setting for the disclosure that follows. A correct disclosure about colds in an advertisement that otherwise does not mention colds and sore throats would be mysterious to many listeners and readers. The explanatory words would show why the advertisement refers to colds and sore throats, and it would prevent the confusion that might otherwise arise.[5] Because the corrective portion of the

[4] The Commission has included comparable preambles in consent orders. See, *e.g.*, *Lens Craft Research & Development Co.*, 84 F.T.C. 355, 364; *Wasem's Inc.*, 84 F.T.C. 209, 214; *Boise Tire Co.*, 83 F.T.C. 21, 25; *Pay Less Drug Stores Northwest, Inc.*, 82 F.T.C. 1473, 1481–1488; *Sugar Information, Inc.*, 81 F.T.C. 711, 723; *ITT Continental Baking Co.*, 79 F.T.C. 248, 255. This interpretation by the agency of its authority is entitled to weight, "even though it was applied in cases settled by consent rather than in litigation" (*Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 835, 391).

[5] An editorial in an advertising trade publication, *Advertising Age*, August 15, 1977, p. 16, makes this same point:

"CONFUSION COMPOUNDED

"If the U.S. court of appeals has its way, Warner-Lambert's ads for Listerine will carry in large letters the statement: 'Listerine will not help prevent colds or sore throats or lessen their severity.' Many consumers will be puzzled. 'Why did they stick that in there? It's not related to anything else in the ad.' A few, recalling Listerine ads of the dim past, may be amused by what may seem a twinge of conscience.

* * * * * *

"FTC had originally ordered that the corrective phrase read: 'Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.' The appeals court insisted the power to require corrective ads exists, but it saw no need to 'humiliate' Listerine. So for the record, it's a corrective ad, but the public may see it as a piece of unrelated and unexplained information. * * *"

advertisement, standing by itself, might seem out of place or confusing, the preamble not only is rationally related to Warner-Lambert's misconduct but also is necessary to make the disclosure clear.

Finally, the preamble is necessary to make the disclosure effective. It drives home the point that earlier advertisements told a different story, and it alerts listeners to the need to review and alter beliefs that may be held subconsciously.

The court of appeals did not fully explain why it struck the preamble from the material required to be included in future advertisements. Its decision apparently rests, however, on its belief that First Amendment considerations place "a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved" (Pet. App. 65a; footnote omitted).[6] We believe that the preamble satisfies even this demanding standard, and that the court of appeals therefore erred on its own terms. We doubt, however, that the court of appeals applied the proper standard of review.

[6] Two other recent cases adopt a similar standard. See *National Commission on Egg Nutrition* v. *Federal Trade Commission*, C.A. 7, No. 76–1969, decided November 29, 1977, supplemental opinion issued January 23, 1978; *Beneficial Corp.* v. *Federal Trade Commission*, 542 F. 2d 611 (C.A. 3), certiorari denied, 430 U.S. 983.

This Court has indicated that "[t]he First Amendment * * * does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–772. The constitutional inhibitions on regulation of speech do not apply with full force to advertising; "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Bates* v. *State Bar of Arizona*, No. 76–316, decided June 27, 1977, slip op. 29. "Advertising that is false, deceptive, or misleading of course is subject to restraint. * * * [T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena" (*id.* at 31). The special attributes of commercial speech may "make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Virginia State Board, supra*, 425 U.S. at 772 n. 24.[7]

None of this Court's recent decisions intimates that the principles of *Jacob Siegel Co.* and the many

[7] See also *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 31 (plurality opinion) (referring with approval to the "long * * * recognized" power of the Federal Trade Commission to restrain misleading and false statements in advertisements).

other cases holding that the Commission has substantial leeway in selecting a remedy for false or misleading advertising should be discarded. On the contrary, because the public has an interest in receiving truthful commercial information, the Commission's requirement that Warner-Lambert disclose that statements that Listerine has no therapeutic value in the treatment of colds and sore throats is "contrary to prior advertising" provides the public with valuable information and ensures that the stream of advertising "flow[s] cleanly as well as freely."

The question of the appropriate standard for the Commission and the courts to use in cases of this sort is important; it affects not only contested cases such as the present one but also the background of legal rules against which consent orders are negotiated. If the Court decides to grant review on Warner-Lambert's petition, therefore, it should grant this conditional cross-petition in order to consider the entire case.

CONCLUSION

If the Court grants Warner-Lambert's petition for a writ of certiorari (No. 77–855), then it also should grant this petition. If it denies Warner-Lambert's petition, then it should deny this petition as well.

Respectfully submitted.

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